

APPEAL NO. 051082  
FILED JUNE 28, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on April 12, 2005. With regard to the only issue before her the hearing officer determined that respondent 1's (claimant) compensable injury of \_\_\_\_\_, "extends to and includes the diagnoses of: major depressive disorder; pain disorder/chronic pain disorder; cervical discogenic pain; cervical radiculopathy; bilateral facet syndrome; myofascial pain syndrome; moderate cervical spondylosis with disc (subligamentous herniations) and end plate abnormalities at C6-C7, C5-C6, C4-C5, and C3-C4" (the claimed conditions).

The appellant (carrier) appealed, contending that the hearing officer erred in her application of the medical records to Texas Workers' Compensation Commission Appeal No. 040150-s, decided March 8, 2004; that the hearing officer impermissibly greatly expanded the scope of Appeal No. 040150-s; that the hearing officer's decision was based on waiver which was not an issue before the hearing officer; and generally attacking the validity of Appeal No. 040150-s. The claimant responds, urging affirmance. The file does not contain a response from respondent 2/subclaimant (subclaimant).

DECISION

Affirmed in part and reversed and rendered in part.

The parties stipulated that the claimant, a custodian, sustained compensable cervical sprain/strain and closed head injuries on \_\_\_\_\_. The claimant saw a number of doctors through the years. The designated doctor in a report dated February 21, 2002, found that the claimant, at that time, was not at maximum medical improvement (MMI) but was expected to reach MMI on "8-26-02." In an unappealed determination the hearing officer found that the designated doctor certified that the claimant reached statutory MMI (see Section 401.011(30)(B)) on October 3, 2002, with a 15% impairment rating (IR). The designated doctor's 15% IR was based on Diagnosis-Related Estimate (DRE) Cervicothoracic Category III; Radiculopathy, of the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides).

On the record at the CCH the parties agreed to withdraw an issue of whether the carrier waived the right to contest compensability of the claimed injury by not timely contesting the injury in accordance with Section 409.021 and 409.022. At the CCH the claimant testified how she sustained her injury and that she had not had any of the claimed conditions prior to her compensable injury and now she has all the claimed conditions, which the doctors attribute to her compensable injury. The carrier presented

the testimony of a peer review doctor who testified (and was cross examined) in some detail how the claimed conditions were not supported by objective testing, that the claimant had sustained only a cervical strain/sprain, and that the claimant's current condition was due to normal aging and perhaps secondary gain issues. During the closing argument the claimant sought to apply Appeal No. 040150-s that the claimed conditions were included in the IR. The carrier presented a legal brief to the hearing officer for the proposition that the Appeal's Panel was impermissibly creating waiver of an extent of injury issue. The hearing officer, although finding that the compensable injury was not a producing cause of the claimed conditions and that the compensable injury did not cause a worsening, acceleration, or enhancement of the preexisting degenerative conditions of the cervical spine, determined that the carrier was liable for the claimed conditions because they were either included in the IR or "resulted from the natural progression of the cervical conditions included in the Claimant's [IR]."

We believe that the hearing officer's decision, and the carrier's appeal, is an over reading of Appeal No. 040150-s, *supra*. First we note that in Appeal No. 040150-s one of the issues was whether the carrier waived the right to contest compensability of the claimed injury by not timely contesting the extent of injury. There was no similar issue in this case and the only issue was whether the compensable injury included the claimed conditions. Nonetheless, even though not a specific issue, the parties, at least by argument, incorporated an issue of whether the compensable injury included the claimed conditions on the basis that they were included, either expressly; or as a "natural progression" in the IR, and that the IR, and consequently the underlying conditions, had become final. There is no evidence that the MMI date and 15% IR was ever disputed and the hearing officer in an unappealed determination found that the carrier did not dispute the IR before the end of the first supplemental income benefits (SIBs) quarter. (Finding of Fact No. 10).

In Appeal No. 040150-s, *supra* the IR included a component for a tremor disorder. Subsequently, the issue was raised whether the compensable injury included the tremor disorder. The Appeal's Panel applied Tex. W. C. Comm, 28 TEX. ADMIN. CODE § 130.102(g) (Rule 130.102(g)) which provides that:

If there is no pending dispute regarding the date of [MMI] or the [IR] prior to the expiration of the first quarter [of SIBs], the date of [MMI] and the [IR] shall be final and binding.

The Appeal's Panel further explained:

The IR in this case [Appeal 040150-s] was final and binding at the end of the first SIBs quarter pursuant to Rule 130.102(g). Rule 130.1(c)(1) states that an IR is the percentage of permanent impairment of the whole body resulting from the current compensable injury. Section 401.011(24) defines IR as the percentage of permanent impairment of the whole body resulting from a compensable injury. Therefore, considering the definition of IR, we conclude that the IR was for the compensable injury and, thus,

any injured body part or condition rated is included in the compensable injury under the facts of this case. Once the IR then became final pursuant to Rule 130.102(g), what was included in the underlying compensable injury was established. Because the 53% IR included the tremor disorder and the IR was not challenged before the expiration of first quarter SIBs, the tremor disorder is included in the compensable injury.

The question is not so much waiver as it is finality of the IR and the underlying conditions which were rated in that IR. In Texas Workers' Compensation Commission Appeal No. 051028-s, decided June 9, 2005, the Appeal's Panel further explained their position stating:

The fact that the date of MMI and IR become final under these circumstances applies equally to the claimant and the carrier. A determination that the compensable injury extends to various other conditions not included in the IR will not allow the claimant to then challenge the date of MMI and/or the IR if there was no pending dispute regarding MMI and/or IR prior to the expiration of the first quarter of SIBs. However, once the first quarter of SIBs has expired and there has been no challenge of the MMI date and/or the IR, the claimant is not precluded from alleging that the compensable injury extends to include other conditions not included in the IR.

In applying Appeal No. 040150-s, *supra* (and Appeal No. 051028-s) the question then becomes which, if any, of the claimed conditions were included in the designated doctor's IR. In the designated doctor's report of February 26, 2003, he goes into some detail regarding the claimant's history, treatment, test results and his physical examination. The designated doctor also recites what various radiographic studies revealed. The report concluded that the "Primary Diagnosis" was:

1. Cervical, thoracic and lumbar sacral spine sprains
2. Myofascitis of left shoulder
3. Closed head injury by history
4. Contusion of left shoulder by history
5. Insomnia by history
6. Cervical radiculopathy

The doctor also gave his opinion on further treatment and in assessing the IR concluded that the "compensable area at this time is the cervical spine region only." (Emphasis added.) The doctor stated:

The patient is assessed according to the DRE model of the cervicothoracic region and is assessed to be a category III and is assigned a 15% whole person impairment rating. Therefore, the patient receives a total of 15% whole person impairment rating as a result of her injuries sustained on \_\_\_\_\_.

DRE Cervicothoracic Category III: Radiculopathy requires the patient to have significant signs of radiculopathy giving examples and structural inclusions. One of the claimed conditions is cervical radiculopathy. We agree that the assessed IR clearly includes cervical radiculopathy as set out in the title of the DRE category and the requirement of "significant signs of radiculopathy." We affirm the hearing officer's determination that the compensable injury extends to and includes cervical radiculopathy.

As to the other claimed conditions, they were not included in the IR. Although the designated doctor may have mentioned some of the other claimed conditions he did so in the context of reciting what other reports and testing showed, not what he was rating. The designated doctor was specific in stating that he was rating the "cervical spine region" only and that he had a diagnosis of a cervical spine sprain. On that basis the hearing officer's determination that the IR included cervical disc herniations and myofascitis (which the doctor diagnosed was in the left shoulder, not the cervical spine) are without support in the evidence and are hereby reversed.

Although the designated doctor recited that the claimant suffered from insomnia and chronic pain even the hearing officer recognizes those were not caused by the compensable injury and the designated doctor did not rate those conditions. We further agree with the carrier that the hearing officer attempted to greatly expand the scope of Appeal No. 040150-s by including conditions not rated by the doctor by improperly including conditions the hearing officer believed to have "resulted from the natural progression of the cervical conditions included in Claimant's [IR]." We reject that notion and hold the finality of underlying conditions are limited to those specifically rated in the IR which became final pursuant to Rule 130.102(g).

The carrier also contends that at the CCH it "was and remains Carrier's contention that [Appeal No.] 040150-s was improperly decided and is entirely inconsistent with Rule 124.3(a)." The Appeals Panel has addressed similar arguments in Texas Workers' Compensation Commission Appeal No. 041240, decided July 14, 2004, and Texas Workers' Compensation Commission Appeal No. 042808, decided December 22, 2004. We decline to change our position on Appeal No. 040150-s as subsequently clarified.

We reverse the hearing officer decision that the compensable injury of \_\_\_\_\_, extends to and includes the diagnoses of: major depressive disorder; pain disorder/chronic pain disorder; cervical discogenic pain; bilateral facet syndrome; moderate cervical spondylosis with disc (subligamentous herniations) and end plate abnormalities at C6-C7, C5-C6, C4-C5, and C3-C4, and we render a new decision that the compensable injury of \_\_\_\_\_, extends to and includes cervical radiculopathy but does not include diagnoses of major depressive disorder; pain disorder/chronic pain disorder; cervical discogenic pain; bilateral facet syndrome; moderate cervical spondylosis with disc (subligamentous herniations) and end plate abnormalities at C6-C7, C5-C6, C4-C5, and C3-C4.

The true corporate name of the insurance carrier is **VALLEY FORGE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM  
350 NORTH ST. PAUL STREET  
DALLAS, TEXAS 75201.**

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Thomas A. Knapp  
Appeals Judge

CONCUR:

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Robert W. Potts  
Appeals Judge

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Margaret L. Turner  
Appeals Judge